

# Fordham Law Review

---

Volume 73 | Issue 5

Article 8

---

2005

## The Need for Mareva Injunctions Reconsidered

David Capper

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 Fordham L. Rev. 2161 (2005).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss5/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The Need for Mareva Injunctions Reconsidered

### Cover Page Footnote

Barrister of the Inn of Court of Northern Ireland; Reader in Law, Queen's University Belfast. LL.B (QUB); LL.M (Cantab). The author gratefully acknowledges the comments made on an earlier draft of this Essay by Professor Joseph C. Sweeney. Responsibility for any errors remain entirely the author's own.

# ESSAY

## THE NEED FOR MAREVA INJUNCTIONS RECONSIDERED

*David Capper\**

### INTRODUCTION

American courts have been deprived of a most useful tool created by the common law courts in England—the *Mareva* injunction—because of a 5-4 decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*<sup>1</sup> In this case the Supreme Court reversed the decision of the U.S. Court of Appeals for the Second Circuit,<sup>2</sup> and erroneously condemned, in dicta, all *Mareva* injunctions in a case where such relief would probably not have been granted in England or the other common law jurisdictions that use it. It is the essence of this essay that the usefulness of the *Mareva* injunction must be reconsidered and approved. The beauty of the *Mareva* injunction—before a decision on the merits—is that claimants can protect their potential judgments at an early time in a dispute when the location of assets against which judgment may be enforced is not a game of hide and seek. Of course, the law of fraudulent conveyances, by state statute or as included in the federal Bankruptcy Act, permits the recapture of assets, the disposal of which rendered a debtor insolvent. But this is often a fruitless and expensive chore, seldom producing sufficient assets to satisfy the judgment; hence the utility of the *Mareva* injunction to freeze assets before they can be concealed. The reasoning of the majority of the Supreme Court in *Grupo Mexicano* was thoroughly unconvincing and fully deserving of the polite but trenchant criticism of a commentator in the *Law Quarterly Review*.<sup>3</sup>

---

\* Barrister of the Inn of Court of Northern Ireland; Reader in Law, Queen's University Belfast. LL.B (QUB); LL.M (Cantab). The author gratefully acknowledges the comments made on an earlier draft of this Essay by Professor Joseph C. Sweeney. Responsibility for any errors remain entirely the author's own.

1. 527 U.S. 308 (1999).

2. *Id.* at 333 (reversing *Alliance Bond Fund v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688 (2d Cir. 1998)).

3. Lawrence Collins, *United States Supreme Court Rejects Mareva Jurisdiction*, 115 Law Q. Rev. 601, 604 (1999) (stating that “from an English viewpoint, the

I. THE *MAREVA* INJUNCTION: AN INTERVIEW

A *Mareva* injunction is an interlocutory (normally *ex parte*) injunction restraining a defendant in civil litigation from disposing of assets so as to render itself judgment proof. It operates in personam against the defendant and does not confer upon the plaintiff any rights in the assets or enhanced priority in the event of the defendant's insolvency. The procedure takes its name from the decision of the English Court of Appeal in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*<sup>4</sup> While the early *Mareva* decisions in England certainly did break new ground, the change was not as revolutionary as a majority of the Supreme Court "made out."<sup>5</sup> The only major common law jurisdiction where the *Mareva* injunction has not flourished is the United States. To persuade a court to grant this relief a litigant normally has to prove the following:

1. A cause of action within the jurisdiction of the court asked to grant relief. This is necessary because the plaintiff's claim for *Mareva* relief is to prevent the disposal of assets that would frustrate the enforcement of judgment in that action. The need for a cause of action within the jurisdiction was first established by the House of Lords in *Siskina v. Distos Compania Naviera S.A.*<sup>6</sup> and reaffirmed by the Privy Council in *Mercedes Benz A.G. v. Leiduck*.<sup>7</sup> Today in the United Kingdom, this is more of an exception than a rule because the Civil Jurisdiction and Judgments Acts of 1982 and 1991 allow British courts to grant *Mareva* relief in support of proceedings going on in European Union and European Economic Area countries. Indeed the Civil Jurisdiction and Judgments Act of 1982 (Interim Relief) Order 1997,<sup>8</sup> made pursuant to section 25(3) of the 1982 Act, has now authorized the High Court to grant interim protective measures in aid of overseas proceedings generally.<sup>9</sup>

---

discussion . . . of the *Mareva* jurisdiction seems to be superficial and based on obsolete material").

4. [1980] 1 All E.R. 213 (C.A. 1975). The first case to recognize the legitimacy of this procedure preceded *Mareva* by just a few weeks. See *Nippon Yusen Kaisha v. Karageorgis*, 1 W.L.R. 1093 (C.A. 1975).

5. The story of the early life of the *Mareva* injunction and how its legitimacy was established is told in David Capper, *The Mareva Injunction—From Birth to Adulthood*, in *The Leading Cases of the Twentieth Century* 255 (E. O'Dell ed., 2000).

6. [1979] 2 A.C. 210 (H.L. 1977).

7. [1996] 1 A.C. 284 (P.C. 1995) (appeal taken from Hong Kong).

8. (1997) SI 1997/302.

9. For commentary on this development, see David Capper, *Further Trans-Jurisdictional Effects of Mareva Injunctions*, 17 Civ. Just. Q. 35 (1998). Under the statute relief may be declined if "in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it." Civil Jurisdiction and Judgments Act, 1982 (Interim Relief) Order 1997, (1997) S.I. 1997/302. For a case where a *Mareva* injunction was granted in aid of proceedings in the United States, see *Motorola Credit Corp. v. Uzan (No. 6)*, [2004] 1 W.L.R. 113 (C.A. 2003).

2. A “good arguable case” on the merits of that cause of action.<sup>10</sup> In *Grupo Mexicano* it was stressed that the plaintiffs were almost certain to win their case, but “good arguable case” means something rather less than that. English courts have resisted the temptation to explain the concept in percentage terms because most *Mareva* applications are ex parte and prospects of success cannot be quantified.<sup>11</sup> In essence, “good arguable case” means that on the material before the court the plaintiff appears to have real prospects of success. Doubts about the plaintiff’s chances of success at trial can go against it either because the court thinks there is insufficient support for a “good arguable case” or in the exercise of the court’s overall discretion.

3. A real risk that any judgment the plaintiff obtains in the proceedings will go unsatisfied.<sup>12</sup> Originally, it was necessary to show that assets were at risk of being transferred out of the jurisdiction,<sup>13</sup> but by the 1980s courts were showing signs of extending the injunction/procedure to disposals of assets within the jurisdiction. Section 37(3) of the Supreme Court Act of 1981<sup>14</sup> confirmed the matter as far as England was concerned and other jurisdictions have followed suit. Courts in the Republic of Ireland apparently insist on evidence that the defendant *intends* by its disposal of assets to render itself judgment proof.<sup>15</sup> If this is really the position of Irish courts, it is different from other jurisdictions which appear only to insist on a risk of disposal for no good reason, such as meeting obligations to other creditors.<sup>16</sup>

4. That it is just and convenient to grant relief. No authority need be cited here because the proposition is an elementary one. An injunction is an equitable remedy and subject to the discretion of the court. Should it appear that there are significant doubts about the plaintiff’s claim for relief or that excessive hardship would be caused to the defendant then relief can be refused. What normally happens is that the injunction is granted on an ex parte application and any reasons why relief should not be granted are considered if the defendant applies to discharge or vary the injunction.

The above are the most significant matters that a plaintiff must prove. Some other important features of *Mareva* injunctions should

---

10. See *Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft GmbH* (The *Niedersachsen*), [1984] 1 All E.R. 398 (C.A. 1983); *Rasu Maritima S.A. v. Perusahaan Pertambangan*, [1978] 1 Q.B. 644 (C.A. 1977).

11. *Grupo Mexicano* was *inter partes* but there is no different rule in these applications.

12. See *Ninemia*, [1984] 1 All E.R. at 398.

13. See *Barclay-Johnson v. Yuill*, 3 All E.R. 190 (Ch. 1980).

14. Supreme Court Act, 1981, c. 54, § 37(3) (Eng.)

15. See *O’Mahony v. Horgan*, [1995] 2 I.R. 411 (Ir. S.C.); *Countyglan plc v. Carway*, [1995] 1 I.R. 208 (Ir. H. Ct.).

16. See David Capper, *Mareva Injunctions: A Distinctively Irish Doctrine?*, 17 Dublin U. L.J. 110 (1995).

also be stated at this stage. Although they are interlocutory orders, *Mareva* injunctions can be granted after judgment<sup>17</sup> and normally are continued after judgment. They are usually granted against assets within the jurisdiction of the court, but in a series of cases in the late 1980s the English Court of Appeal extended relief to extraterritorial assets.<sup>18</sup> As equity acts in personam and not against the defendant's assets, there was no reason why the court could not reach extraterritorial assets. But a major practical consideration, of which courts were already well aware, was highlighted by this development. To make a *Mareva* injunction stick it is necessary to serve it on third parties, particularly banks that are holding the defendant's assets, and enjoin them from allowing the assets to be disposed of.<sup>19</sup> Certain procedural safeguards have to be built into the injunction to protect third parties from other liabilities to which they might otherwise be subject. This was accomplished for orders concerning assets within the jurisdiction in *Z Ltd. v. A-Z and AA-LL*<sup>20</sup> and for extraterritorial orders by means of the *Babanaft* proviso which exempts third parties from actions necessary to avoid legal liability under the law of another jurisdiction.<sup>21</sup>

*Mareva* injunctions contain a number of procedural and other safeguards for the protection of the defendant. If granted, the usual order is limited to the maximum amount of the plaintiff's claim.<sup>22</sup> Because most applications are made ex parte there is a duty on the applicant to make full and frank disclosure of all matters of relevance

---

17. *Stewart Chartering, Ltd. v. C. & O. Mgmts. S.A.*, [1980] 1 W.L.R. 460 (Q.B. 1979).

18. *See Republic of Haiti v. Duvalier*, [1990] 1 C.A. 202 (1988); *Derby & Co. Ltd. v. Weldon* (Nos. 3 & 4), [1990] 1 Ch. 65 (1989); *Babanaft Int'l Co. S.A. v. Bassatne*, [1990] 1 Ch. 13 (1988); *Derby & Co. Ltd. v. Weldon*, [1990] 1 Ch. 48 (1988); *see also* David Capper, *Worldwide Mareva Injunctions*, 54 Mod. L. Rev. 329 (1991); Lawrence Collins, *The Territorial Reach of Mareva Injunctions*, 105 Law Q. Rev. 262 (1989).

19. The English Court of Appeal has recently decided that a bank holding a *Mareva* defendant's assets, on whom a *Mareva* injunction is served, owes the plaintiff a duty of care in tort to ensure that the frozen assets are not disposed of. *See Comm'rs of Customs and Excise v. Barclays Bank plc*, [2005] 1 Lloyd's Rep. 165 (C.A. 2004), available at 2004 WL 25282645 (summary).

20. [1982] 1 Q.B. 558 (C.A. 1981).

21. *See Babanaft*, [1990] Ch. at 36. The terms of the proviso are:

Provided always that no person other than the defendants themselves shall in any way be affected by the terms of this order . . . or concerned to enquire whether any instruction given by or on behalf of either defendant or anyone else, or any other act or omission of either defendant or anyone else, whether acting on behalf of either defendant or otherwise, is or may be a breach of this order . . . by either defendant . . . (unless and to the extent that it is enforced by the courts of the states in which any of the defendants' assets are located).

*Id.*

22. *Z Ltd.*, [1982] 1 Q.B. at 558.

of which the court should be aware.<sup>23</sup> As Sir Peter Pain pointed out in *O'Regan v. Iambic Productions Ltd.*,<sup>24</sup> this applies in particular to matters not in the applicant's favor. Failure to discharge this duty normally results in the injunction being discharged on the application of the defendant. As with all interlocutory injunctions, the applicant usually has to give an undertaking in damages to compensate the defendant should it become clear later that the injunction should not have been granted, for example, when the defendant successfully applies to the court to discharge the injunction. The practice of some courts, such as the Chancery Division in England, is to review *Mareva* injunctions at an *inter partes* hearing a short time after the grant of an *ex parte* order. As an alternative to discharge of the order, the defendant may seek a variation that allows payments to be made to third parties in the ordinary course of business or reasonable expenditure to be incurred. The order normally specifies a sum for reasonable living expenses but this may have to be adjusted in light of information the defendant puts before the court.

Justice Scalia's opinion in *Grupo Mexicano* argued that there was nothing new about debtors not paying debts or preferring creditors.<sup>25</sup> This is, with respect, a disturbingly complacent view of the reality of modern civil litigation. As Lord Hoffmann pointed out in his foreword to Steven Gee's *Mareva Injunctions and Anton Pillar Relief*,<sup>26</sup> it became apparent by the 1960s that "civil law remedies were inadequate to deal with cases in which there was often no serious dispute: the problem was simply the enforcement of the law against a party who was determined to evade it."<sup>27</sup> Everyone knows that there are many more judgments marked in default of defense and settlements out of court than there are trials. Whether evading legal liabilities through disposal of assets is new or not, it is a real and serious phenomenon. Failure to deal with it allows the legal process to be treated with contempt. Probably, at least, the extent of the problem is a feature of modern technology which enables assets to be whisked away in an instant—a matter only grudgingly acknowledged by Justice Scalia.<sup>28</sup> How the English courts came to change their previous practice and grant these injunctions will be discussed in the context of analyzing the opinion of the Court below.

---

23. *R. v. Kensington Income Tax Comm'rs ex parte Princess Edmond de Polignac*, [1917] 1 K.B. 486 (C.A. 1917); *Dormeuil Freres S.A. v. Nicolian Ltd.*, [1988] 1 W.L.R. 1362 (Ch. 1988).

24. 139 New L.J. 1378 (Q.B. 1989).

25. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1998).

26. Steven Gee, *Mareva Injunctions and Anton Pillar Relief* (4th ed. 1998).

27. *Id.* at xiii.

28. *Grupo Mexicano*, 527 U.S. at 322.

II. *GRUPO MEXICANO*—FACTS AND HISTORY

To supply the context in which the Supreme Court came to decide the issue of whether federal courts could grant *Mareva* relief, it is necessary to at least outline the facts and procedural history of the *Grupo Mexicano* case. This history also explains one issue on which the dissenters joined the opinion of the Court, an issue worth discussing because it illuminates the nature of the *Mareva* injunction.

The plaintiffs (Alliance Bond) were investment funds that had purchased \$75 million (out of \$250 million) of unsecured notes issued to Grupo Mexicano by the Mexican government.<sup>29</sup> Grupo Mexicano held one of several toll-road concessions from the Mexican government, and the notes were issued because the toll-road projects ran into difficulties due to the economic crisis that struck Mexico in the mid-1990s.<sup>30</sup> As well as being indebted to the plaintiffs, Grupo Mexicano owed other debts of about \$450 million.<sup>31</sup> In Grupo Mexicano's 1997 Form 20-F filed with the Securities and Exchange Commission, it appeared that Grupo Mexicano's liabilities exceeded its assets and there was "substantial doubt" whether it could continue as a going concern.<sup>32</sup> In October 1998, it publicly announced that it would place \$17 million of the notes in trust for employees in respect of wages and salaries, and that it had transferred a further \$100 million of the notes to the Mexican government to pay back taxes.<sup>33</sup>

As Grupo Mexicano had no other substantial assets and appeared to be at risk of insolvency, if not insolvent already, there appeared to be a substantial risk that any judgment the plaintiffs obtained on the notes would go unsatisfied.<sup>34</sup> This was the finding of the district court in proceedings that were different from the usual *Mareva* proceedings in that they were *inter partes*.<sup>35</sup> The plaintiffs were not able to ground their claim for *Mareva* relief in any risk that Grupo Mexicano would dissipate its assets.<sup>36</sup> Indeed, Grupo Mexicano was quite open about what it was doing and the plaintiffs consequently had to frame their case in terms of preferring Mexican creditors over themselves and other creditors.<sup>37</sup> As discussed below, after the opinions of the Court and the minority have been discussed in detail, this sort of conduct does not provide the strongest grounds for *Mareva* relief.<sup>38</sup> The order of the district court enjoined Grupo Mexicano from "dissipating,

---

29. *Id.* at 310.

30. *Id.* at 310-11.

31. *Id.* at 311.

32. *Id.*

33. *Id.* at 311-12.

34. *Id.* at 312.

35. *See id.*

36. *See id.* at 311-12.

37. *See id.* at 312.

38. *See infra* Part IV.



disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any [debtor's] right to, interest in, title to or right to receive or retain, any of the [notes]."<sup>39</sup> Given that the notes were unsecured, this was strong relief indeed.

Two other factual circumstances should be stated. Grupo Mexicano was a Mexican corporation and had voluntarily submitted to the jurisdiction of the district court.<sup>40</sup> The plaintiffs had no other cause of action within the jurisdiction aside from this case. Neither were the notes connected with the jurisdiction, so the claim for *Mareva* relief was effectively a claim for extraterritorial relief of the kind that English courts did not show themselves ready to grant until the *Mareva* injunction was fourteen years old. Even assuming the Supreme Court had been prepared to acknowledge the legitimacy of *Mareva* relief in the United States, this was an ambitious application.

The Second Circuit dismissed the appeal against the grant of this relief<sup>41</sup> and certiorari was granted on the petition of Grupo Mexicano ("the petitioners").<sup>42</sup> Meanwhile the plaintiffs continued with their debt action on the notes themselves.<sup>43</sup> They obtained judgment in the U.S. District Court for the Southern District of New York and a permanent injunction to prevent the petitioners from disposing of the notes in any way.<sup>44</sup> The petitioners appealed this judgment to the Second Circuit, but did not challenge the permanent injunction.<sup>45</sup> The plaintiffs argued that this rendered the appeal against the preliminary injunction moot.<sup>46</sup> Essentially the argument was that the preliminary injunction merges into a permanent injunction, so that there is nothing to appeal against if the latter is left intact.<sup>47</sup> In deciding that the issue was not moot the Supreme Court got this part of its decision right, but its reasoning was far from satisfactory and revealed considerable conceptual confusion as to the nature of *Mareva* relief.

As Justice Scalia pointed out, the plaintiffs' argument failed to appreciate that preliminary *Mareva* relief is different from ordinary

---

39. *Id.* at 312-13 (quoting unpublished district court order).

40. *See id.* at 310, 312.

41. *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688 (2d. Cir. 1998).

42. *Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 525 U.S. 1015 (1998).

43. *See Grupo Mexicano*, 527 U.S. at 313 (noting that the case proceeded in district court while the appeal of the preliminary injunction was pending in the circuit court).

44. *See id.* at 312-13 (enjoining petitioners "from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any" of the petitioner's rights to the notes).

45. *See id.* at 313.

46. *See id.*

47. *See id.*

preliminary relief.<sup>48</sup> This, however, was not for the reasons Justice Scalia indicated. Ordinary preliminary relief merges into a permanent injunction because it restrains until the outcome of the trial the very thing a permanent injunction restrains the defendant from doing afterwards. The permanent injunction thus continues what the preliminary injunction had been doing temporarily. *Mareva* injunctions, however, are ancillary to the main relief claimed at trial, being designed to preserve assets so that any judgment granted in the action is practically enforceable. The judgment is for debt or damages and where, as is usual, the *Mareva* injunction is continued in aid of enforcement this remains ancillary to the principal relief granted at trial. Justice Scalia contrasted ordinary preliminary relief from *Mareva* relief in terms of the former confirming that the defendant's conduct was unlawful all along and the latter as establishing that disposal of assets became unlawful only with the grant of the permanent injunction.<sup>49</sup> This is confusing because it implies that judgment makes the disposal of assets unlawful. Where the plaintiff's claim is unsecured this is simply wrong. Disposal of assets after judgment is unlawful only where a permanent injunction is granted restraining the disposal of those assets. As indicated in the previous section a *Mareva* injunction should contain provisions protecting the defendant by allowing the defendant to meet ordinary business expenses and pay other creditors. The injunction should not restrain the defendant from disposing, in any way, its only substantial asset unless the plaintiff has a proprietary interest in that asset, which the plaintiffs in *Grupo Mexicano* did not have.

But why did the petitioners want to appeal the *Mareva* injunction when they had not appealed the permanent injunction? This was because they wanted to enforce the plaintiffs' undertaking in damages provided as a condition of the grant of *Mareva* relief. Because the grant of a permanent *Mareva* injunction was ancillary to the judgment and not a confirmation that the preliminary *Mareva* relief was justified, it was eminently possible for the petitioners to show that until judgment they had suffered loss as a result of being restrained from doing what they were entitled to do at that time. Because the grounds on which they attacked the *Mareva* injunction went to the root of the federal courts' power to grant such relief, it would seem that this approach must undermine the permanent *Mareva* injunction as well. Where a preliminary *Mareva* injunction is attacked on the basis that the grounds for granting it had not been established, the permanent *Mareva* injunction could stand because the question whether it was needed in support of enforcement would become a fresh issue to be considered again at trial.

---

48. See *id.* at 313-18; see also *id.* at 335 (Ginsburg, J., concurring in part and dissenting in part).

49. See *id.* at 316.

III. OPINION OF THE COURT—REJECTING *MAREVA*

Justice Scalia's opinion began relatively uncontroversially. He pointed out that when the thirteen British colonies won their independence and afterwards formed the United States of America, they constituted themselves a separate legal system but inherited the fundamental principles of the common law.<sup>50</sup> The power of the federal courts to grant equitable relief, including injunctions, was derived from the Judiciary Act of 1789.<sup>51</sup> The Act authorized the federal courts to apply "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."<sup>52</sup> Justice Scalia quoted the following:

Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789.<sup>53</sup>

None of this can be quarrelled with because the implication is that the federal courts inherited the principles of equity administered by the English Court of Chancery. Those principles are not immutable like "the law of the Medes and Persians is, That no decree, nor statute, which the king establisheth may be changed,"<sup>54</sup> but can be adapted to the perceived needs of later times. English courts did not grant anything resembling *Mareva* injunctions in the late eighteenth century, but that does not mean that developments along those lines would be incompatible with the said principles. If courts in England and other parts of the common law world have subsequently developed *Mareva* injunctions without significant assistance from the legislature, that would seem to create a presumption that these orders are consistent with eighteenth century equitable principles.

Shortly after this promising start Justice Scalia's opinion fell into error. He next formulated the question for the Court, as follows: "We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity."<sup>55</sup> This is the wrong question. It envisages an inordinately narrow ability for courts of equity to mold the remedies they grant over time to meet changing circumstances. It rests on a specific conception of originalism that, whatever its merits in relation to judicial review of legislative action,<sup>56</sup>

---

50. See *id.* at 318.

51. *Id.*

52. *Id.* (quoting *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939)).

53. *Id.* (quoting A. Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928)).

54. *Daniel* 6:15 (King James).

55. *Grupo Mexicano*, 527 U.S. at 319.

56. This conception of originalism is one that restricts the ability of the courts to grant relief only in the concrete circumstances envisaged by the persons who

is singularly unhelpful in the development of private law. Judicial restraint is favored when the will of the elected legislature is being constitutionally tested. But private law and civil procedure are normally left to the courts to mold in the light of experience.

The correct approach was the one adopted by Justice Ginsburg for the dissent. Beginning with an acknowledgement that the source of judicial power lay in the principles of equity inherited from England in 1789, Justice Ginsburg lambasted the opinion of the Court for its narrow conception of those principles.<sup>57</sup> To the argument that the relief requested here was not afforded in 1789, Justice Ginsburg replied:

In my view, the Court relies on an unjustifiably static conception of equity jurisdiction. From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England . . . we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.<sup>58</sup>

Justice Ginsburg presented a strikingly different picture of a "dynamic equity jurisprudence" that was "of special importance in the commercial law context"<sup>59</sup> and supported this by reference to the Supreme Court's decrees in desegregation and antitrust cases.<sup>60</sup> Although the opinion of the Court did improve upon its puzzlingly narrow approach, to ask whether it would be legitimate to expand equitable remedies beyond their late eighteenth century sphere of operation, it seems clear that the Court's inability to envisage a development like *Mareva* was heavily colored by its conception of what it was that American courts inherited from England.

The next section of the opinion of the Court did, at least, suggest that the majority accepted that equity was not locked in a time warp. However, even this section cranks up the rhetoric excessively and overuses pejoratives in its dismissal of the *Mareva* injunction. Thus the argument that recognition of *Mareva* relief would further the "grand aims of equity" and fill a gap where legal remedies were not "practical and efficient"<sup>61</sup> was met by a lengthy quotation from the 1836 edition of Justice Joseph Story's *Commentaries on Equity*.<sup>62</sup> This

---

formulated the relevant principle, as opposed to a principle of higher abstraction to which courts could apply to other circumstances at a later time. One very interesting account of this idea of originalism may be found in Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

57. See *Grupo Mexicano*, 527 U.S. at 335 (Ginsburg, J., concurring in part and dissenting in part).

58. *Id.* at 336.

59. *Id.* at 337.

60. *Id.* at 337 n.4.

61. *Id.* at 321 (quoting Ginsburg, J., concurring in part and dissenting in part).

62. *Id.* at 321-22 (quoting I Joseph Story, *Commentaries on Equity Jurisprudence* § 12, at 14-15 (1836)).

passage refutes the proposition that equity can grant relief inconsistent with the common law. Yet, it is not on point because *Mareva* relief contradicts no common law principle and operates to ensure that judgments, more often than not common law judgments, can be enforced. When Justice Scalia expressed the majority's unwillingness to expand equitable jurisdiction, he took none of the sting out:

We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a “default rule”. . . not of flexibility but of omnipotence.<sup>63</sup>

One is tempted to ask what “broad boundaries” Justice Scalia was actually talking about. The majority's conception of equity's boundaries is extremely narrow, not broad. The statement that the relief claimed here has been “specifically disclaimed by longstanding judicial precedent”<sup>64</sup> is false. No authority was cited in support of this intemperate statement other than *Lister & Co. v. Stubbs*,<sup>65</sup> which was concerned with an application for a very different kind of relief. The plaintiff there sought an injunction to compel the defendant to pay money into court in security for the plaintiff's claim.<sup>66</sup> A *Mareva* injunction operates in personam by restraining the defendant from disposing of assets. The injunction preserves those assets for the potential benefit of all the defendant's creditors and provides no priority or security for the litigant who moved the court. The most that can be said about the novelty of the *Mareva* injunction is that prior to 1975 it had not been granted. To say, as did Justice Scalia, that it had been “specifically disclaimed” is wholly without foundation.<sup>67</sup>

Justice Scalia's next argument was that the *Mareva* injunction was such a dramatic departure from previous practice that its introduction should be left to Congress.<sup>68</sup> As already mentioned, private law and civil procedure are usually matters left to the courts. The courts in England, Ireland, Canada, Australia, New Zealand, Singapore,

---

63. *Id.*

64. *Id.*

65. 45 Ch. D. 1 (C.A. 1890). Cotton, L.J. writes in *Lister* that the relief requested was in effect proprietary. *See id.* at 13. *Lister* was cited at a later stage of Justice Scalia's opinion. *Grupo Mexicano*, 527 U.S. at 328. Scalia also cites *De Beers Consolidated Mines Ltd. v. United States*, 325 U.S. 212, 222 (1945), but the discussion at this section of the opinion demolishes any pretensions that case has as “longstanding judicial precedent.” *Grupo Mexicano*, 527 U.S. at 322, 326-27.

66. *Lister*, 45 Ch. D. at 1.

67. *Grupo Mexicano*, 527 U.S. at 322.

68. *Id.* at 322, 329.

Malaysia, and other parts of the common law world have shown themselves to be fully cognizant of this reality. The opinion of the Court effectively says everyone else is wrong and only we are right! The argument as developed by Justice Scalia is based on mainly obsolete material<sup>69</sup> and reveals complacency and misunderstanding. His answer to Justice Ginsburg's argument about the increasing complexities of modern business relations and sophisticated ways of hiding and disposing of assets<sup>70</sup> was to say that there is nothing new about debtors not paying debts or preferring creditors—the law of fraudulent conveyances and bankruptcy exists to deal with these conflicts. There may be nothing new about debtors not paying debts but the debtor's prison has been abolished and the legal system has not caught up with modern ways of debtors evading their responsibilities.<sup>71</sup> The reference to the law of fraudulent conveyances and bankruptcy simply misses the point. The abuse of process which the *Mareva* injunction is designed to stop is the dissipation of assets, not their transfer to persons willing to allow the debtor to continue using them and not preferences of some creditors over others. A further development of this line of argument implied that debtors should be protected from interference with using their assets until judgment.<sup>72</sup> There is an air of unreality about this. Trials in debt actions are relatively rare and the legal process can very easily be exploited by defendants to buy time to make themselves judgment proof. Debtors should be protected against abuse of process by plaintiffs but that is what the measures outlined above<sup>73</sup> are designed to do. The idea that an indefinite injunction should be imposed because the plaintiff believes the defendant can easily dispose of the assets necessary for securing the plaintiff's claims is inaccurate.<sup>74</sup> Why is there so little confidence by the U. S. Supreme Court that the grant

---

69. This is the view of Lawrence Collins in his piece on *Grupo Mexicano*. See Collins, *supra* note 3, at 604. In addition to Justice Story's *Equity Jurisprudence*, the Court relied on Marion Hetherington's 1983 Australian text. *Grupo Mexicano*, 527 U.S. at 328-29 (citing Marion Hetherington, *Introduction to the Mareva Injunction*, in *Mareva Injunctions* 1 n.1 (1983)). Justice Scalia also cited Professor Rhonda Wasserman's article. *Id.* at 329 (citing Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 Wash. L. Rev. 257, 337 (1992)). The Wasserman article may not be obsolete, but, as an article published in a jurisdiction that did not recognize the *Mareva* injunction, it may have been cited to prove a point.

70. *Grupo Mexicano*, 527 U.S. at 338-39 (Ginsburg, J., concurring in part and dissenting in part).

71. Justice Ginsburg's minority opinion drew attention to increasingly sophisticated foreign haven judgment-proofing strategies and "technology that permits nearly instantaneous transfer of assets abroad." *Id.*

72. *Id.* at 329.

73. See *supra* notes 20-21 and accompanying text.

74. See Justice Ginsburg's refutation of this "parade of horrors." *Grupo Mexicano*, 527 U.S. at 339-42 (Ginsburg, J., concurring in part and dissenting in part) (internal quotation marks omitted).

of *Mareva* relief, subject to these conditions, can maintain a fair balance between the parties?

The Court then proceeded to discuss three previous Supreme Court cases where relief similar to that requested in *Grupo Mexicano* had been at issue.<sup>75</sup> An injunction to prevent disposal of assets was granted in *Deckert v. Independence Shares Corp.*,<sup>76</sup> but in that case the plaintiffs' claims were proprietary. The plaintiffs sought the rescission of contracts with, and restitution of money paid to, an insolvent investment fund.<sup>77</sup> Preliminary injunctive relief to preserve the fund against which the plaintiffs had a strong claim was properly granted,<sup>78</sup> and thus the case is easily distinguishable from *Grupo Mexicano*. Also easily distinguishable and essentially similar was *United States v. First National City Bank*<sup>79</sup> where an injunction was granted against foreign taxpayers pursuant to statutory powers and in protection of an equitable tax lien. Relief was refused in *De Beers Consolidated Mines Ltd. v. United States*,<sup>80</sup> where no proprietary relief was at issue. *DeBeers* was an antitrust action brought against foreign corporations by the Justice Department.<sup>81</sup> The injunction sought was intended to prevent the defendant corporations from removing assets from the jurisdiction against which a fine could be levied.<sup>82</sup> *DeBeers* was another 5-4 decision, in which Justice Roberts, writing for the majority, stated that the purpose of the injunction was to obtain security for the antitrust action.<sup>83</sup> Notably, the case was decided thirty years before the first *Mareva* injunction was granted. As a basis for determining that *Mareva* relief cannot be granted, this has a distinctly underwhelming effect. Justice Ginsburg put it well when she said, "it is one thing to recognize that equity courts typically did not provide this relief, quite another to conclude that, therefore, the remedy was beyond equity's capacity."<sup>84</sup>

The next section of the *Grupo Mexicano* opinion is perhaps the most disappointing of all. Here Justice Scalia acknowledged the existence of arguments addressed to the Court as to why it *should* recognize the legitimacy of *Mareva* relief.<sup>85</sup> All Justice Scalia could bring himself to do was quote the following passage from the brief for the United States, which had only an amicus curiae role in the

---

75. *Id.* at 324-27.

76. 311 U.S. 282 (1940).

77. *Id.* at 285.

78. *Id.* at 288-89.

79. 379 U.S. 378 (1965).

80. 325 U.S. 212 (1945).

81. *Id.* at 215.

82. *Id.*

83. *Id.* at 219.

84. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 338 (1999).

85. *Id.* at 339.

proceedings. The United States' arguments for acceptance of the *Mareva* injunction were:

[S]implicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment "at law") and those that do not; avoiding the necessity for plaintiffs to locate a forum in which the defendant has substantial assets; and, in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions.<sup>86</sup>

Justice Scalia made no attempt to explain what any of these arguments meant, let alone to assess their merit or persuasiveness. The arguments of the plaintiffs and those who filed briefs supporting them were treated with the same insulting dismissiveness that was shown throughout this opinion to the very eminent judges of other countries who have molded this procedure with great care. After setting out these arguments for the *Mareva* injunction, Justice Scalia roundly declared that there were important counter-considerations.<sup>87</sup> Among these were the prospect of abuse of process, the importance of jury trial protection, and the historic principle that before judgment an unsecured creditor has no rights in the property of the debtor. These arguments have been sufficiently refuted in the previous discussion.

Next, the opinion argued that *Mareva* relief was not needed anyway because creditors could obtain sufficient protection against debtors making themselves judgment proof by seeking state law prejudgment attachment orders, available in federal court through Rule 64 of the Federal Rules of Civil Procedure.<sup>88</sup> In fact, the *Mareva* injunction was even more objectionable, because it could render existing creditor protection remedies irrelevant. "Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?"<sup>89</sup> Aside from over-reliance on rhetoric, this argument is misconceived for the following reason: *Mareva* injunctions may be easier to get because of the ex parte procedure, but they contain considerable protection for defendants and third parties, and they do not provide relief as extensive as attachment because they operate in personam only.<sup>90</sup>

---

86. *Id.* at 330.

87. *Id.*

88. Fed. R. Civ. P. 64.

89. *Grupo Mexicano*, 527 U.S. at 330-31.

90. As Justice Ginsburg pointed out, *Mareva* injunctions do not deprive the defendant of possession of attached assets. *Id.* at 337-38 (Ginsburg, J., concurring in part and dissenting in part).



Justice Scalia then went on to argue that “[m]ore importantly” this new order could alter the balance between creditors’ and debtors’ rights developed through the bankruptcy laws.<sup>91</sup> This argument is nonsensical. *Mareva* injunctions operate in personam and are incapable of altering the balance of creditors’ and debtors’ rights in bankruptcy. Next, Justice Scalia asserted that the *Mareva* injunction might encourage a “race to the courthouse” that could prove fatal to a “struggling debtor.”<sup>92</sup> No evidence was produced to substantiate this fear and it is extremely difficult to see why creditors would be racing to the courthouse were this relief available. The *Mareva* injunction gives creditors no rights to debtors’ assets and does not improve their position in bankruptcy. The relief does make suing more worthwhile, but if the debtor is insolvent there will be little point in continuing with the case. In the latter case, the debtor’s bankruptcy becomes more fruitful for all of its creditors, who might suffer greater hardship were the debtor free to dissipate assets and leave nothing for anybody. Justice Scalia tried to make something out of the fact that the plaintiffs did not represent all of the noteholders.<sup>93</sup> To the extent that one creditor has exercised its own initiative, and where its interests are not antithetical to those of other creditors, this is not on point. Where a potential conflict exists between the applicant creditor and others, as was the case here, it is left to the court’s discretion whether to grant relief in that particular case. As an argument against recognition of the *Mareva* injunction, Scalia’s argument does not hold up to scrutiny.

The opinion of the Court then worked its way towards its conclusion. This section added very little to previous sections but is worthy of comment nonetheless because it demonstrates the opinion’s overall lack of substance. First, Justice Scalia stated that the Court would not decide who had the better of the arguments for and against recognition of the *Mareva* injunction.<sup>94</sup> After the very lengthy dismissal of the *Mareva* injunction that preceded it, this comment cannot be taken seriously. The reason for setting out these arguments was to show that resolving them was incompatible with the “democratic and self-deprecating judgment we have long since made: that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence.”<sup>95</sup> As this Essay has shown, these arguments were resolved in past cases and legal commentary, and the opinion of the Court contains no self-deprecating qualities whatsoever. Next Justice Scalia cited another lengthy quotation from Justice Story. This

---

91. *Id.* at 331.

92. *Id.*

93. *Id.*

94. *Id.* at 332.

95. *Id.*

excerpt contains a quotation from Selden equating the Chancellor's conscience with the length of his foot.<sup>96</sup> The clear implication of this is that courts in England and other common law countries are exercising a similar jurisdiction whenever they grant *Mareva* relief. Scalia's parting shot was that "[t]he debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress."<sup>97</sup> This argument has been answered already, but it provides a suitable opportunity to move on and consider whether there was any other decision the Supreme Court could have reached if it felt genuine hesitancy about recognizing the *Mareva* injunction.

#### IV. A MIDDLE COURSE: DECLINING TO GRANT *MAREVA* RELIEF IN *GRUPO MEXICANO*

The arguments of the majority against recognizing the *Mareva* injunction are not totally devoid of merit. It is true that this type of injunction is strong relief, that it can involve hardship for defendants, and that it does represent a significant departure from the practice of the courts in the common law world prior to 1975. Unfortunately, these arguments were presented with such a woeful lack of balance that most of their persuasive force was dissipated. Even more unfortunate was the failure of the majority to consider whether a better disposal of the case before the Court would have been to decline to grant a *Mareva* injunction in these circumstances, while leaving undecided the question of whether this kind of relief could ever be granted.

As indicated above, the plaintiffs did not make the strongest application for *Mareva* relief. Three factors would have undermined their position had they appeared before a court in England. First, there was the tenuous connection between the defendants and the jurisdiction. In England, the Civil Jurisdiction and Judgments Act of 1982,<sup>98</sup> section 25(3) as amended, allows the court to grant *Mareva* relief where the plaintiff has no cause of action within the jurisdiction, but also gives the court discretion to refuse relief if it thinks that having no jurisdiction apart from the section makes it inexpedient to grant relief.<sup>99</sup> Grupo Mexicano had submitted to the jurisdiction of the district court, but its connection with New York remained rather tenuous. Second, the assets to be frozen were located in Mexico. English courts strongly emphasized that this sort of relief is exceptional when they first asserted the power to grant it.<sup>100</sup> But third,

---

96. *Id.* at 332-33 (citing I Joseph Story, Commentaries on Equity Jurisprudence, § 19, at 19 (1836)).

97. *Id.* at 333.

98. Civil Jurisdiction and Judgments Act, 1982, c. 27, § 25(3) (Eng.).

99. *Id.*

100. See *supra* note 18.

and more importantly, there was little evidence that Grupo Mexicano was going to dispose of its assets in a way that *Mareva* principles find objectionable. In one of the earliest *Mareva* cases in England, *Iraqi Ministry of Defence v. Arcepey Shipping Co.*,<sup>101</sup> the injunction was varied to allow the defendant to discharge an obligation not legally owed but at least binding in honor.<sup>102</sup> The court pointed out that *Mareva* injunctions were not designed to prevent defendants from paying their creditors, including this sort of creditor, and were intended really to deal with dissipation of assets that makes the defendant judgment proof.<sup>103</sup> The plaintiffs could only prove in *Grupo Mexicano* that the defendants were setting aside assets in favor of some of their creditors and that it was likely this would mean they (the plaintiffs) would not be paid.<sup>104</sup> As Lawrence Collins has pointed out, in light of all these circumstances, it would have been unlikely that an English court would have granted a *Mareva* injunction.<sup>105</sup>

The first two of these considerations were matters of discretion and it is difficult to see how the Supreme Court could have justified interfering with the trial judge's decision on them. However, the third consideration went right to the heart of the *Mareva* procedure and was concerned with the proper purposes of *Mareva* relief. It was reviewable error and made it wholly unnecessary for the Supreme Court to decide that federal courts had no jurisdiction to grant *Mareva* relief. Due to the inadequate consideration given to the arguments for accepting the *Mareva* injunction and the weakness of the arguments for rejecting the injunction, it is deeply disappointing that the Supreme Court did not even consider the approach taken by the House of Lords in the first *Mareva* case to be appealed to that tribunal. In *Siskina v. Distos Compania Naviera*,<sup>106</sup> their Lordships confounded Lord Denning's fears that they would repudiate the new procedure altogether by deciding that it was not available in that case because the plaintiffs had no cause of action within the jurisdiction.<sup>107</sup> But by taking the overkill approach the Supreme Court has made it very difficult for this kind of relief to be debated again in the foreseeable future.

---

101. 1 Q.B. 65 (1981).

102. *Id.* at 72-73.

103. *Id.*

104. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund Inc.*, 527 U.S. 308 (1999).

105. Collins, *supra* note 3, at 604.

106. [1979] A.C. 210 (H.L. 1977).

107. See Lord Denning, *The Due Process of Law* 141, 145 (1980).

## V. WHY THE UNITED STATES SHOULD ACCEPT THE *MAREVA* INJUNCTION

Although this part of the Essay discusses Justice Ginsburg's minority opinion, it does not take the form of the "line by line" commentary administered to the opinion of the Court. For the most part Justice Ginsburg's opinion is a convincing refutation of the Court's reasons why the *Mareva* injunction should *not* be recognized in the United States but is rather less convincing on why this procedure *should* be recognized.

The minority opinion attempts to put the case for granting *Mareva* relief to the plaintiffs by showing how the circumstances of the case cried out for a remedy. Thus Justice Ginsburg pointed out that the plaintiffs' evidence was uncontested and that it must have appeared to the district court that they were almost certain to get judgment.<sup>108</sup> In the absence of provisional relief, the plaintiffs would be unable to collect their debt and the grant of the injunction would preserve the status quo until trial.<sup>109</sup> This is all well and good except that Justice Ginsburg erred when she explained why it was that the plaintiffs would be unable to collect their debt.<sup>110</sup> This was because the defendants preferred their Mexican creditors. As explained above, this is an insufficient basis for the grant of *Mareva* relief.<sup>111</sup> The plaintiff must show that the defendant is *dissipating* assets, not using them to meet other legal liabilities. The case for recognizing the *Mareva* injunction must be found in other arguments than those used by Justice Ginsburg.

*Grupo Mexicano* begins with the recognition that there is no jurisdictional bar to the acceptance of the *Mareva* injunction. The United States inherited the same system and principles of equity as England possessed prior to the formation of the United States. That system was passed on to several other common law countries. All of these were able to follow the lead of England and spawn a remedy which has today assumed enormous importance within these countries' systems of civil and commercial remedies. All this was accomplished with very little help from the legislature. The legislative help that was given mainly confirmed the legitimacy of the remedy and rectified matters of detail.<sup>112</sup> So the Supreme Court had a choice.

---

108. As indeed they had by the time of the Supreme Court hearing.

109. *Grupo Mexicano*, 527 U.S. at 333-35 (Ginsburg, J., concurring in part and dissenting in part).

110. *Id.*

111. See *supra* Part IV.

112. See, for example, the Supreme Court Act of 1981, which states:

The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as

But why should it have exercised that choice in favor of the *Mareva* injunction?

It should have accepted the *Mareva* injunction because the United States very likely experiences the same problems that led eminent jurists around the world to fashion a remedy to protect litigants from unsatisfied judgments and courts from having their process stultified. It is counterintuitive to deny that defendants with no defense to civil claims would never transfer assets out of the jurisdiction or otherwise dissipate them so that no judgment could be enforced against them. A lawyer with any experience knows that in the vast majority of debt claims any argument on liability is most likely to relate to parts of the claim and not to the entire sum. Furthermore, a lawyer is hired not merely to go to court and win the case. He must also collect the debt. Enforcement is everything. Obviously, the burden rests on the opponents of *Mareva* injunctions to substantiate their position. If the United States declines to recognize the *Mareva* injunction there may be a risk that it becomes a haven for persons determined to evade their legal responsibilities to deposit their assets. This, indeed, accounts for the extension of *Mareva* relief in the United Kingdom to situations where there are assets within the jurisdiction but the plaintiff's claim is justiciable only in another jurisdiction.<sup>113</sup>

In fairness it should be recognized that there are some problems with the *Mareva* injunction. To freeze a defendant's assets, even limited to a maximum sum, on an ex parte application, even with provision for the defendant to seek discharge or variation of the order, can cause enormous hardship. This hardship is recognized in other parts of the common law world but the view is taken that it is better to provide a measure of relief for claimants, while providing some protection for defendants, than to ignore the problem. People and organizations who are owed vast sums of money are not likely to write it all off with a philosophical shrugging of the shoulders. They may opt for less savory ways of being paid than recourse to a legal process that cannot do anything for them. While this Essay may read like the inverse of the "parade of horrors" invoked against the *Mareva* injunction,<sup>114</sup> it is probably no less plausible. Which risk is the one to take and which is the one to avoid? Why has the United States chosen the path of isolationism?

There may, of course, be some arguments against the *Mareva* injunction not credited in the discussion above. One argument, which the opinion of the Court made very little of, is that *Mareva* relief is not needed because a suitable alternative exists in the form of pre-trial

---

well as in cases where he is not, domiciled, resident or present within that jurisdiction.

Supreme Court Act, 1981, c. 54, § 37(3) (Eng.).

113. See *supra* notes 6-9 and accompanying text.

114. See *supra* note 74 and accompanying text.

attachment. The Court might have argued that given the doubts about *Mareva* relief the United States should rely on its own tried and trusted creditor protection mechanisms. But Justice Scalia chose not to rely on this alternative remedy.<sup>115</sup> In any event this argument would have lent itself rather better to declining to grant *Mareva* relief in *Grupo Mexicano*, rather than ruling out this relief altogether.<sup>116</sup> The other arguments presented in the opinion of the Court relied far too much on rhetoric and bombast and carried no persuasive force. The last word at this stage should be left to three American commentators. Commenting on the *Grupo Mexicano* case, James, Hazard, and Leubsdorf state:

As a matter of policy, this makes little sense. Although a preliminary injunction of this sort can raise problems, for example by giving the party obtaining it an advantage over other creditors, it can also be a useful way to prevent an unscrupulous defendant from dispersing its assets while litigation winds its lengthy way.<sup>117</sup>

Aside from the implication that a *Mareva* creditor can get some sort of priority over other creditors, this puts the matter nicely. Removing the error only makes the argument stronger.

#### CONCLUSION

This Essay has not pulled too many punches, and its tone and arguments are not characterized by moderation. But all this is only because the Court does such an awful job of explaining why the *Mareva* injunction should not be part of the remedial machinery of the federal courts. Only lip service was paid to the arguments presented for accepting relief of this kind and the reasons advanced against accepting it were sloppy, superficial, intemperate, bombastic, unbalanced, and downright insulting to judicial colleagues in kindred legal traditions who have forged this relief very carefully over a quarter of a century. Not even the opinion of the minority reveals a clear understanding of what a *Mareva* injunction is. If the Supreme Court could not get itself properly briefed so that it understood the nature of the relief it was being asked to grant, then the least dangerous course would have been to decline to grant an injunction in the circumstances of the case before it. One also has to wonder why certiorari was even granted in *Grupo Mexicano*. There was no conflict between the circuits and the issues were mainly of private/commercial law and civil procedure not obviously requiring determination by the highest court. An opinion by the Second Circuit might well have carried more weight than one from the Supreme Court on a matter like this. Perhaps the complex relationship

---

115. See *supra* notes 80-83 and accompanying text.

116. See *supra* Part IV.

117. Fleming James, Jr. et al., *Civil Procedure* 340 (5th ed. 2001).

between the United States and Mexico had something to do with the Court's intervention, although nothing of this appears in the opinions. The United States was nursing the traumatized Mexican economy through the currency and other crises of the mid 1990s and the relationship between the two countries was affected by the North American Free Trade Agreement. Was the United States simply determined to keep out of a dispute concerned with such a major infrastructure project as the toll roads? Certainly the absence of rational dispassionate analysis in the opinion of the Court is disturbing. The Court's decision does not supply one with a great deal of confidence about the Court's ability to deal calmly with issues of more obvious political controversy.

## *Notes & Observations*

•

•

•

•

•